

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: 25947/2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE

SIGNATURE

In the Matter between:

Struanne Edward Haigh

Plaintiff

And

The Road Accident Fund

Defendant

JUDGMENT

Maumela J.

1. This is an application for leave to appeal which is opposed. In it, the Applicant seeks an order which provides for the following:
 - 1.1. That its late filing of the Application for leave to appeal to the above honourable court be condoned; and
 - 1.2. That its application for leave to appeal be granted

Re: CONDONATION.

2. It is trite that in applications for leave to appeal, it is required that applicants show "good cause" and that they address court on the following aspects:
 - 2.1. Full and satisfactory explanation for the delay;
 - 2.2. Prospect of success;

- 2.3. Prejudice to the other party and
- 2.4. Importance of the matter.

EXPLANATION OF DELAYS.

3. In this regard, the Applicant has to advance a satisfactory explanation on why he delayed in bringing the application. In that regard, the Applicant submits that its failure to lodge this application in time was not due to its deliberate conduct but was due to circumstances beyond its control.
4. To that end, the Applicant points out that in this matter, judgment was handed down on the 12th of June 2018, however, the relevant department within the Applicant's office only became aware of this on the 18th of July 2019. The Judgment needed to be studied in order to formulate an approach to be adopted where after an opinion was sought from the Counsel who ran the trial.
5. In August 2019, a memorandum of advice was obtained from the aforementioned Counsel. Subsequently, the memorandum of advice was studied, and on the 5th of September 2019, it was escalated for payment approval. It is critical to note that different accounting officers must approve payment by means of signature before it reaches the final approval stage.
6. It was only in October 2019, that final approval was sought from the CEO; (Chief Operating Officer), who in turn requested further submissions in order to satisfy himself and to ensure that payment was indeed justified and reasonable. In the light of the CEO's queries, a memorandum for the appointment of Senior Counsel to advise and iron out certain aspects in the matter had to be prepared for approval by the CEO. And on the 13th of December 2019, the CEO duly approved the appointment of Senior Counsel.
7. The Applicant's erstwhile Attorneys were mandated to appoint Senior Counsel and on 17 January 2020, Senior Counsel was briefed to advise on the matter. On the 20th of January 2020, Senior Counsel consulted with the Junior Counsel who ran the trial after which they drafted a memorandum of advice and forwarded same to the Applicant's erstwhile Attorneys on the 17th of February 2020.
8. On the 20th of February 2020, the memorandum of advice was delivered to the CEO's office who, despite his busy schedule regarding the day to day running of the institution, had to make

time to study the memorandum and to give further instructions. During March 2020, the Applicant's erstwhile Attorneys were instructed to prosecute this application and by the 23rd of March 2020, the drafting of the application, as defective as it was, was completed. Unfortunately, during this period, the President of South Africa declared a national lock down due to the Covid 19 Pandemic. As a result, it was inevitable that the speedy processing of the application was immensely undermined.

9. The Applicant submitted further that the national lockdown, to a larger extent, affected the smooth operation of the it's day to day office activities as its offices were at the time completely shut down by the presidential decree. Further, as a result of the national lock down, communication with the relevant officials of the Applicant to either obtain instructions and/or sign court papers was cumbersome.
10. On the 31st of May 2020, the service level agreement between the Applicant and its erstwhile Attorneys was terminated by effluxion of time. The Applicant's erstwhile Attorneys, Rambevha Morobane Attorneys' mandate, was also affected by the lapse of the service level agreement and as a result the Applicant had no Attorneys over that time. The Applicant requested all former panel Attorneys, including Rambeva Morobane Attorneys, to return files, (including files on this matter), however, the files on this matter were amongst those which were not returned.
11. The Applicant pointed out further that it remained without legal representation on this matter until August 2020, when Mac Ndlovu Attorneys was appointed from the Applicant's corporate panel of Attorneys, and instructed to prosecute this application. Naturally, the absence of files pertaining to this matter and the fact that Mac Ndlovu Attorneys had to investigate the status of the matter also impacted negatively upon the possibility to speedily prosecute this application.
12. On the 25th of February 2021, Mac Ndlovu withdrew as Attorneys of record for the Applicant and once more the Applicant remained without legal representation in the matter. During March 2021, the Applicant's current Attorneys were appointed as Attorneys of record. The matter amounted to 8x lever arch files which had to be studied by the Applicant's current Attorneys.

13. During this time, the Applicant's corporate legal department (department responsible for this matter) was more often than not, engaged with the rule 45A application which was heard by the full bench of the above Court. This matter was important to the Applicant as it involved a writ of execution and attachment of the Applicant's bank account. Consequently, scheduling a meeting with the corporate legal department/official to either consult, obtain instructions and/or sign legal documents proved to be an onerous task.
14. Eventually, a consultation was scheduled between the Applicant and its legal team where after, a memorandum of advice was sent to the Applicant, wherein the legal team expressed its view on the matter. On the 20th of August 2021, and after the Applicant had studied the memorandum of advice, it instructed its Attorneys to proceed with this application. On the 23rd of August 2021, the Applicant's attorneys consulted with Counsel and instructed Counsel to proceed with the drafting of the papers for this application.
15. Upon Counsel's completion in drafting the papers, same were sent to the Applicant's Attorneys who in turn had to facilitate the signing and commissioning. Eventually, the Applicant's founding papers were signed and commissioned, and on the 21st of September 2021, same were filed at court. To that end, the Applicant submits that it has sufficiently explained the reasons behind the delay. Eventually, the Applicant's founding papers were signed and commissioned, and on the 21st of September 2021, they were filed at court.

RE: PREJUDICE.

16. The Applicant submits that in the light of the fact that the Respondent must be compensated fairly and reasonably, allowing another court to properly ventilate the matter with the aim of determining an appropriate, fair and reasonable compensation to be awarded will not prejudice the Respondent. It is further submitted that in the event where condonation is not granted, the Respondent stands to be unduly enriched at the expense of taxpayers' monies and/or other victims of motor vehicle accidents, thus prejudicing the Applicant. The point was also made that the interests of justice permit the granting of condonation.

PROSPECTS OF SUCCESS.

17. The applicant contends that should there are strong prospects of success, so much so that another is likely to arrive at a different decision. In this regard, reasons for this contention are provided hereunder.
18. The Applicant submitted that in this matter, the approach to the question of condonation should be similar to that adopted by His Lordship Mr. Justice Holmes in the case of *Melane v Santam Insurance Co. Limited*¹; at page 532 C – D where he stated the following: *“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay.”*
19. Based on the above, the Applicant submits that a proper explanation for the delay in referring this matter to Court has been provided and consequently the court has to consider granting condonation.

RE: LEAVE TO APPEAL.

20. The Applicant submitted that after an assessment of the applicable facts in this case and the law which has to be applied, a conclusion can be reached to the effect that reasonable prospects exist on the basis of which it can be concluded that another court may come to a different conclusion. It submitted that it is in the interest of justice that leave to appeal be granted.
21. It submitted that the principles governing the question, *‘whether in this application, leave to appeal should be granted’* or not, are well-

¹. 1962 (4) SA 531 (A).

established. To that end, the Applicant submitted that the Superior Courts Act², provides the statutory matrix. This Act preserves the fundamental basis for the granting of leave to appeal. More particularly, section 17 (1) (a)³, provides that leave to appeal may be granted where the Judge is of the opinion that “*the appeal would have a reasonable prospect of success*” or where “*there are some other compelling reasons as to why the appeal should be heard, including conflicting judgments on the matter under consideration.*”

22. The Applicant submits that concerning a consideration whether; *reasonable prospect of success*” do exist, which is the first element of section 17(1); it has correctly demonstrated that reasonable prospects exist on the basis of which the appeal would succeed. It makes the point that it should not be required to show there is a measure of ‘certainty’ in existence showing that the appeal will succeed. It argues that where a party shows that there are reasonable prospects in place, the court ought to find that the granting of leave to appeal is justifiable. The test therefore remains whether or not there are reasonable prospects in place indicating that another court may come to a conclusion which is different from that to which the court a quo did.
23. The Applicant argues that it has proven that such prospects are attendant to this matter. Based on that, it submitted that the application of the above principles to this matter demonstrate that there are reasonable prospects for another court to arrive at a different conclusion. The Applicant submitted therefore that in the result, this Court ought to grant leave to appeal.

REASONABLE PROSPECTS OF SUCCESS ON APPEAL.

24. The Applicant avers that notice of the application for leave to appeal in this case identifies five reasons on the basis of which the amount awarded as general damages, may be determined differently so that a considerably lower amount may be awarded to the Plaintiff.
25. The following is a summary of facts which constitute grounds on the basis of which the application for leave to appeal ought to be granted namely:

². Act No 10 of 2013.

³. Of the Superior Courts Act 10 of 2013.

- 25.1. That the Court erred in awarding the Respondent an amount of R 2 500 000.00 in respect of general damages, because the said award is substantially at variance with previous comparable awards. It argues that the amount awarded in this case results in an unrealistic overcompensation.
 - 25.2. That the Court erred in not having regard to all the facts in the matter more particularly, the injuries sustained by the Respondent, and therefore, failed to apply its discretion judicially by over exaggerating the injuries and overlooking previous comparable awards;
 - 25.3. That the Court erred in not awarding an amount that is fair and reasonable under the circumstances of this matter in that it failed to duly take into regard the kind of injuries and the *sequelae* suffered by the Respondent and relied on case law that is not comparable to the facts of the matter at hand;
 - 25.4. That the Court erred in not giving an award that is fair to both sides but instead gave an award that is tantamount to 'pouring out largesse from the horn of plenty' at the Applicant's expense; and
 - 25.5. That the Court erred in relying on three decided cases which involved Plaintiffs who were rendered quadriplegic and/or tetraplegic, and whose injuries are not similar to those of the Respondent in the matter at hand.
26. It is common cause between the parties that the hospital records and the relevant expert reports reveal that the Respondent suffered the following injuries and sequelae:
- Severe traumatic brain injury;
 - Neck injury;
 - Pneumothorax injury;
 - Rib fractures;
 - Pulmonary contusion and
 - Splenic rupture;
 - Liver rupture;
 - Fracture of the right radius and ulna and
 - Soft tissue injury on the knees;

TREATMENT.

27. The Respondent was subjected to the following treatment:
- Regarding a head injury, he was placed in an induced coma with a GCS score of 13/15;
 - Intercostal drains were inserted bilaterally on his left pneumothorax; and

- Injuries on the right radius and ulna galeazzi fracture dislocations were treated by way of open reduction and internal fixation, debriment and muscle repair, the fixatives remain *in situ*.
28. The Applicant points out that in arriving at the amount awarded for general damages, and at page 22 of the judgment dated 12 June 2018, the Court considered the following aspects:
- That the Plaintiff used to play cricket for the Litchenburg Club, action cricket, did cycling, Jogging and walking;
 - That he used to attend to the garden and handyman tasks at home;
 - That he discontinued all sport and hobbies due to bilateral shoulder pain, knee pain, pelvis and abdominal pain; and
 - That the Plaintiff suffered devastating losses.
29. The Applicant contends that it has advanced sufficient reasons why it argues that the Court failed to exercise its discretion judicially and therefore erred. It also contends that it has provided sufficient reasons why it views that reasonable prospects of success exist on the basis of which another court may arrive at a different conclusion regarding the amount awarded for general damages.
30. In that regard, the Applicant argued that the Court erred in awarding an amount of R 2 500 000.00 for general damages as, taking into account the injuries and *sequalae* thereof. It argues that such an award was made at a substantial variance from previous awards in comparable cases. It points out that as a result, the award granted to the Respondent constitutes an unrealistic overcompensation and it demonstrates that the Court failed to use its discretion judicially.
31. In demonstrating that possibility exists that her mother court may arrive at a different where it concerns damages to be awarded to the Plaintiff, the Applicant referred to the following cases.
- 31.1. In the case of *Megalane NO v The Road Accident Fund*⁴; R 2,068 000 was awarded in 2018 under the following terms:

⁴. 2006 (5A4) QOD 10 (W).

- 31.1.1. *The plaintiff was an 11-year-old Schoolboy at the time of the accident and 14 years old at the time of trial.*
- 31.1.2. *Injuries and effects (sequelae). Severe brain injury with diffuse and focal brain damage in the form of a subdural haematoma resulting in cognitive impairment characterised by poor verbal and visual memory, poor concentration and distractibility, impaired executive function characterised by frontal lobe disinhibition causing inappropriate behaviour, speech difficulties characterised by dysarthria and word retrieval difficulties, bilateral hemiparesis with severe spasticity of all four limbs and left facial paralysis as well as aphesis. Confined to a wheelchair, Intelligence level of a young child, severe permanent physical and mental disabilities rendering him unemployable.”*

32. The Applicant points out that the Respondent who was 9 years old at the time of the hearing of the matter and therefore older than the plaintiff in the case law foreshadowed in paragraph 20 above, suffered far less injuries. Unlike the Plaintiff in the *Magelane* case, the Respondent in this case can walk, drive a car, go to work/enjoys amenities of life with discomfort etc... The Applicant points out that the amount awarded to the Respondent in this case is a clear variance to previous awards in comparable cases.

33. In the case of *D’Hooghe v Road Accident Fund*⁵, R 1 051 000 was awarded in 2018 subject to terms where the following injuries and effects (sequelae), were sustained.

33.1. *“ 21 year old male suffered Diffuse axonal brain, fractures of the humerus, tibia and tibial plateau, severe trauma to the lungs and chest, development of respiratory distress syndrome requiring intubation and ventilation for two months, extended recuperation in hospital complicated by embolism, infections of the lungs and development of bed*

⁵. 2010 (6J2) QOD 1 (ECP).

sores on the face and body, permanently disabled with unattractive gait, immobile right ankle, a clawed right foot, pain and restricted movement of the right hip, an inability to straighten the right knee and right elbow, discomfort in the lower back, inability to walk fast or run, impairments of social emotional cognitive and executive functioning manifested by excessive fatigue, episodes of frustration, irritability short-term memory deficit, attention and concentration lapses, significant impact upon the ability to work and to compete in the employment market.”

34. The Respondent was 23 years old when the award for general damages was granted, almost the same age with the Plaintiff in the case of *D’hooghe*. The Applicant states that while it appreciates that no two cases can be exactly the same, however, note ought to be had of the fact that the Respondent’s injuries and the Plaintiff’s injuries in *D’hooghe* are closely comparable. The Respondent was awarded R 2 500 000 for similar injuries to that of the Plaintiff in *D’hooghe*, whereas the latter was awarded R 1 051 000 in 2018 terms. The Applicant contends that the variance obtaining is both substantial and glaring.
35. Applicant points out that the Court referred to the case of *Marine & Trade Insurance (CO) Ltd v LATS NO⁶*; decided in 2018, where an amount of R 2 982 000-00 was awarded to the plaintiff under the following background:
- 35.1. *“Plaintiff had become a permanent and almost complete quadriplegic, she retained only a slight movement of rotation of the head and ineffectual movement of the right hand, her mental understanding of her condition distress and depression sufficient for her to think of suicide and request euthanasia, her condition was described as “the grossest loss imaginable” it calls for the “high water mark” for general damages. The court found that for her condition there is no comparable case recorded”.*
36. The Applicant argues that in this case, the condition of the Respondent cannot be described as the grossest loss

⁶. QOD (3) 1A:

imaginable because the Respondent can still go to work, can walk on his own feet, can drive a car, perform light duty tasks etc. Plaintiff submitted that the Respondent's injuries are far less serious than the Plaintiff in the *Lats* case. It argues that the Respondent's award of R 2 500 000 cannot be justified by the *Lats* case referred to in the judgment herein because the injuries are dissimilar.

37. In this case, the Court also referred to the case of *Sgatya v Road Accident Fund QOD*. In that case, the Plaintiff was awarded an amount of R 2 097 000 as compensation for Injuries and sequelae,(effects) as follows: *"The Plaintiff suffered a cervical spine injury, presented with a fracture at C5 resulting in paralysis from the shoulder downwards, she became a permanent tetraplegic, she had no useful hand or arm function, suffered loss of bladder and bowel function, she had indwelling urethral catheter and was eventually placed on alternate day bowel regime and provided a motorised wheelchair, she faced about 10 future operations, she required full time helpers, life expectancy was curtailed, suffered depression due to meaningless and purposelessness of her life, likely to present with chronic pain, loss of sexuality, her condition was diagnosed as irreversible."*
38. The Applicant stated that the Plaintiff's injuries and its effects in the *Sgatya* case are far more serious in nature as compared to the injuries and sequelae sustained by the Respondent in this matter. It avers that the Respondent was awarded a higher compensation for less injuries. Notwithstanding the fact that the Respondent also suffered serious injuries, he could still do most of the things he did before the injuries except heavy duty tasks, as opposed to the Plaintiff in *Sgatya*.
39. The Applicant submitted that, had this Court properly directed itself to all the relevant facts of this matter and gave due regard to all the surrounding circumstances in the *Sgatya* case as a guide, then this Court, acting carefully, would not have awarded the Respondent, who had less injuries and sequelae, an amount that is substantially more than the Plaintiff in the *Sgatya* case.
40. Applicant argues that this Court must ensure that its award is fair to both sides and should award fair and just compensation to the "*Plaintiff*". It argues that the Court ought not to pour out largesse from the horn of plenty at the expense of the "*Defendant*".

Applicant points out that this approach was also followed by Nugent J A in the case of *Minister of safety and security v Seymour*⁷; where he indicated the following: “*Money can never be more than a crude solatium for the deprivation of what in truth can never be restored and there is no empirical measure for the loss. The awards I have referred to reflect no discernible pattern other than that our courts are not extravagant in compensating the loss. It needs also to be kept in mind when making such awards that there are many legitimate calls upon the public purse to ensure that other rights that are no less important also receive protection*”

41. The Applicant submitted that it appreciates the fact that ordinarily, an appellate court would be hesitant to interfere with a discretionary decision of another court. However, it submitted that the variance of the award granted to the Respondent for general damages, is so glaringly that it views that the Court failed to exercise its discretion judicially. It views that the amount of compensation for general damages awarded by this Court is way far more than what another court could have reasonably made, properly directing itself to all the relevant facts and principles.
42. The Applicant submits that the court award made by this Court for general damages is unprecedented when compared to Judgments by other courts when adjudicating over comparable cases. Based on that, the Applicant submitted that there are strong prospects that another court may arrive at a different award for general damages and that it has made a proper case for leave to appeal to be granted.
43. The basis for this application for leave to appeal is that the amount of compensation for general damages granted by the Court is far higher than what the Applicant regards as what another court could reasonably have awarded. The Court may award considering the nature, extent and effect of the injuries sustained by the Plaintiff. It also considered the age at which the Plaintiff got involved in the accident and the length of over which he is likely to remain dependent on the award of compensation made.

⁷. 295/05 [2006] ZASCA 71; [2006] SAC 67 (RSA); [2007] 1 ALL SA 558 (SCA) (30 MAY 2006).

44. However, the court considers that determinations to be made in this regard come relative. Therefore, the possibility that another court, given the same facts could reasonably arrive at a different conclusion and therefore determine a notably lower amount of compensation for the benefit of the Applicant cannot reasonably be excluded.
45. Consequently, the application for leave to appeal is granted and the following order is made:

ORDER.

45.1. The application for leave to appeal is granted.

45.2. Cost shall be costs in the appeal.

T.A. Maumela.
Judge of the High Court of South Africa.